No. 20,292

IN THE

United States Court of Appeals

For the Ninth Circuit

KENNETH R. RICKEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

By an indictment filed in the United States District Court for the Northern District of California on September 9, 1964 (C.T. 1),[1] appellant was charged in two counts with violations of Section 7201 of the Internal Revenue Code (26 U.S.C., Section 7201) by filing false and fraudulent income tax returns for the years 1960 and 1961 with the District Director of Internal Revenue at San Francisco, California (C.T. 2-3). The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure. Appellant was acquitted on the first count but con-

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[1]Throughout this brief, references to the Clerk's Transcript will be designated by "C.T.", and references to the Reporter's Transcript will be designated by "R.T."

victed on the second count alleged in said indictment (C.T. 4), and by final judgment of May 21, 1965, was fined $7,500.00 and was placed on probation for a period of 26 weeks, with a condition of probation being that appellant place himself in the custody of the United States Marshal each Friday evening for 26 consecutive weeks and remain in said custody for a period of 48 hours on each such weekend (C.T. 6). Appellant filed notice of appeal to this Court on May 28, 1965 (C.T. 7). The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure. This Court has jurisdiction to review the final judgment of the District Court. 28 U.S.C., Sections 1291, 1294.

STATEMENT OF THE CASE

Appellant, Kenneth R. Rickey, was indicted on September 9, 1964, on two counts under Section 7201 of the Internal Revenue Code (26 U.S.C., Section 7201). The indictment alleged that appellant had understated his and his wife's taxable income and income tax liability as follows:

	1960	1961
Taxable income reported	$110,945.00	$24,312.00
Correct taxable income	147,027.00	38,794.10
Income tax liability reported	49,819.00	6,653.00
Correct income tax liability	67,954.00	13,594.79

The evidence showed that the following items of income had been omitted from the tax returns filed by appellant:

1960

Long-term capital gain from sale of General Telephone & Electronics Corp. stock	Total gain	$72,254.01
	50% taxable	$36,127.00

1961

Long-term capital gain from sale of stock:

Coca-Cola Co.	$ 3,623.84
Island Creek Coal Co.	341.46
General Telephone & Electronics Corp.	15,051.31
" " " "	5,017.10
" " " "	5,017.10
Total gain	$29,050.81
50% taxable	$14,525.00

Dividend income:

Coca-Cola Co.	$ 60.00
Island Creek Coal Co.	75.00
Total	$135.00

The foregoing data are summarized in computations made by the witness Forrest Calkins, a Technical Advisor of the Internal Revenue Service (Ex. 36, 37). At the conclusion of the evidence, the parties stipulated that the amounts of income set forth above had been omitted from appellant's returns (R.T. 650).

The jury found appellant not guilty of count one of the indictment but guilty of count two (C.T. 4).

During the trial, appellant objected to the introduction of evidence of any statements that appellant made to Internal Revenue Service agents at a con-

ference held on May 14, 1962, in the Internal Revenue Offices, and moved to suppress such evidence on the ground that said statements were taken in deprivation of appellant's right to counsel guaranteed by the Sixth Amendment to the United States Constitution (R.T. 239, 305, 313). The Court below overruled the objection and denied the motion to suppress (R.T. 306). The specification of error is addressed to this ruling.

The Internal Revenue Service began its investigation of appellant's tax returns for the year 1960 in early April, 1962, when Internal Revenue Agent Berton J. Barr commenced an audit of appellant's returns for that year (R.T. 174). On April 19, 1962, Revenue Agent Barr wrote appellant a letter requesting an interview (R.T. 175). Appellant responded by telephone a few days later and he and Revenue Agent Barr arranged for Barr to come to appellant's home in order to examine appellant's tax return and substantiating documents (R.T. 175-176).

On April 26, at appellant's home, Revenue Agent Barr told appellant that he wanted to compare the dividends appellant had reported on his 1960 tax return with the shares of stock appellant owned and to compare the income as shown on the tax return with the deposits in appellant's bank account, as recorded in appellant's bank statements (R.T. 176-177). Appellant responded to Barr's request for information regarding the stock shares by providing Barr with a ledger containing the dividend information (R.T. 178). Appellant and Barr then computed a

proposed additional tax, including interest to date, which appellant agreed to pay when Barr's findings were approved by his superiors (R.T. 180).

When Barr returned to his office, however, he was unable to reconcile the dividends as shown on the returns, plus the additional information appellant had given him, with the total number of shares owned (R.T. 181). Revenue Agent Barr then wrote to appellant on April 30, informing him of this discrepancy (R.T. 183-185), and on May 8, appellant telephoned Barr and informed him that he had forgotten to report the sale of 1300 shares of General Telephone stock at a total selling price of approximately $102,-000.00 (R.T. 186). Immediately, Revenue Agent Barr made another appointment and the next day he went to see appellant at his residence (R.T. 186).

Barr's second meeting with appellant at his home lasted between one and two hours (R.T. 282). Appellant had prepared an analysis of the sales of General Telephone stock with the dividends (R.T. 283). Appellant and Barr went over the worksheet and analysis in detail, while appellant attempted to explain the omission of the General Telephone stock sales from his 1960 return. At the end of the interview, appellant stated that he would like to file an amended return and pay the tax deficiency (R.T. 284, 524). Barr informed appellant that he wanted to discuss this matter with his superiors and that he would call appellant as soon as he had discussed it with them (R.T. 284).

On returning to his office, Revenue Agent Barr reported to Glenn Adrian, head of the fraud group

of the Audit Division of the Internal Revenue Service (R.T. 250, 356-358). Adrian sent Barr to the office of Marc P. Mott, a Special Agent of the Intelligence Division (R.T. 250). It is the function of the Intelligence Division of the Internal Revenue Service to investigate possible criminal violations of the Internal Revenue Code (R.T. 359). Special Agent Mott learned that Revenue Agent Barr, in his examination of appellant's 1960 tax return, had discovered that appellant had failed to report over $100,000.00 in sales of General Telephone & Electronics Corp. stock; that Revenue Agent Barr had the details of the total selling price, the gain and the amount of the tax involved; and that appellant had admitted this (R.T. 358). Special Agent Mott knew that appellant had talked with Revenue Agent Barr about filing an amended return (R.T. 362).

Mott instructed Barr to suspend his investigation of appellant's return (R.T. 235, 362) and told Barr to telephone appellant and ask him to come to the twenty-first floor at 100 McAllister Street, San Francisco (R.T. 363). The conference room on the 21st floor at 100 McAllister Street was equipped with a hidden microphone, which Mott himself had installed a week or so previously (R.T. 255). It was the only room Mott knew to be so equipped (R.T. 257). Mott did not tell Barr to advise appellant that a special agent of the Intelligence Division wanted to meet with him (R.T. 235).

On the same or following day, Revenue Agent Barr called appellant and arranged for the conference. Barr

told appellant that he had discussed the matter with his superiors, that it would be satisfactory for appellant to file an amended return and pay the additional tax owing for 1960, and that he and Mr. Glenn Adrian would be present at the conference (R.T. 285, 524). Barr told appellant to go to the 21st floor at 100 McAllister Street, but he made no reference to the Intelligence Division, to any special agent, to a fraud investigation, or to a possible criminal prosecution (R.T. 524-525).

Although it is not a routine practice to tape-record secretly what is said in a conference (R.T. 255), shortly before appellant was scheduled to arrive for his conference with Barr and Adrian, Special Agent Mott connected a tape-recorder in a nearby room to the hidden microphone which he had previously placed inside a telephone terminal box in the conference room (R.T. 254-255, 363-364). To complete his preparations, Mott ran an additional wire down the hall, out the window and back into another room (R.T. 367-368), where he stationed Special Agent Hilkie to operate the tape-recorder (R.T. 376). On only one other occasion did Mott use the hidden tape-recorder (R.T. 270).

Special Agent Mott's objective at the May 14 meeting was to question appellant regarding the circumstances behind the unreported sales of the $100,000.00 worth of General Telephone stock. Mott had not yet reached a definite conclusion to prosecute appellant. He testified that his specific purpose for interrogating appellant was to obtain incriminating statements, if possible, and to listen to any possible explanations

(R.T. 252-253). Among the several reasons Special Agent Mott gave for secretly tape-recording his questioning of appellant were that he wished to test the truthfulness of appellant, that he anticipated questioning appellant in the future and comparing the consistency of appellant's subsequent answers with the answers appellant would give at their first confrontation, and that he wanted to be able to prevent appellant from ever being able to demonstrate anything to the contrary of his first statement (R.T. 372, 374). Special Agent Mott secretly records conferences with taxpayers when he believes that the taxpayer may make an admission or explanation and that, at a later time, the taxpayer may change his testimony (R.T. 271).

Appellant arrived at the May 14 meeting for the purpose of filing an amended return, and he took with him a check to pay the additional tax owing (R.T. 296). Appellant was not accompanied by counsel. He had not contacted an attorney in connection with the tax investigation because he did not feel that he had any reason for doing so (R.T. 287). He was not aware that there was a question of fraud in his case or that his case might involve possible criminal prosecution (R.T. 288). He had had no contact with any special agent of the Intelligence Division prior to May 14, 1962, he did not know what a special agent was or what his functions were, and he had never known of an audit involving the Intelligence Division (R.T. 287-289). He did not know that the Intelligence Division was particularly concerned with tax fraud

or that it was frequently involved in cases where criminal prosecution was under consideration (R.T. 288). Appellant came to the meeting, expecting to meet Revenue Agent Barr and Glenn Adrian, whom he assumed to be Barr's superior (R.T. 289, 525).

On being introduced, Special Agent Mott showed appellant his pocket credentials as a special agent, which appellant glanced at only briefly (R.T. 286). Appellant assumed that Special Agent Mott was there as Mr. Barr's superior (R.T. 536). Mott told appellant that he was a special agent in the Intelligence Division and that it was his job to determine whether appellant had wilfully failed to report a substantial amount of capital gain on his 1960 return (R.T. 261). Mott informed appellant, "that he did not have to answer any of my questions or give me any documents or records if he felt such action would tend to incriminate him, and that if he did answer any of my questions or give me any documents, that the testimony could be used against him." (R.T. 265). Appellant, nevertheless, was not aware that this was a criminal investigation (R.T. 291). Special Agent Mott made no reference to any possible criminal investigation, nor did he use the words, "fraud" or "fraudulent" (R.T. 262). *Special Agent Mott did not advise appellant of his right to counsel nor of his absolute right to remain silent* (R.T. 234, 535-536).

Present at the May 14 meeting were Revenue Agent Barr, Special Agent Mott, appellant and a shorthand reporter or stenographer, who recorded a question-and-answer statement (R.T. 376, 534). But the tape-

recorder had been operating before the stenographer arrived in the room and it continued after she left (R.T. 376). Appellant, of course, was not aware that his conversation was being taped. The existence of the tape-recording was not disclosed to appellant until after the start of his trial (R.T. 100, 540-541). At the May 14 conference, the stenographer recorded a sworn statement from appellant (Ex. 30) which was admitted into evidence over objection (R.T. 311-316). During the sworn statement, Special Agent Mott interrogated appellant in detail regarding his failure to report the 1300 shares of the General Telephone stock sales (R.T. 321-334).

After the question-and-answer statement had been concluded and the stenographer had left the conference room, there was further conversation between appellant and Special Agent Mott. Mott reminded appellant that appellant had told Barr he was going to check his 1961 return, after discovering the omissions from his 1960 return (R.T. 334-335). In response to Mott's question, appellant replied that he had discovered that some sales of Island Creek Coal Co. stock and Coca-Cola Co. stock had been inadvertently omitted from his 1961 return (R.T. 335). Mott testified at the trial, over objection, that appellant then explained that he had discovered the omission by going to his broker and checking over all of his brokerage statements (R.T. 335). Mott also testified, over appellant's objection, that this explanation was contained in the tape-recording that had been secretly made at the May 14, 1962 meeting (R.T. 341). Appel-

lant's motion to strike this testimony was denied (R.T. 341). The tape-recording itself was not offered in evidence.

Special Agent Mott further testified that on August 15, 1962, and September 21, 1962, appellant had told Mott that he had discovered the omission of the Island Creek Coal and Coca-Cola stock sales when he looked through his desk drawers and discovered a ledger sheet that had been misplaced and consequently had not been reflected in his 1961 return (R.T. 340). On both of those later occasions, appellant had denied giving the earlier inconsistent explanation (R.T. 340). Appellant testified at the trial that he had no recollection of having made the first explanation (R.T. 619, 620). Appellant's conviction was on the count relating to the year 1961.

At the May 14 meeting, after discussing the omitted sales of Island Creek Coal and Coca-Cola stock, Mott asked appellant if there was anything else that he wished to bring up or anything else wrong with his returns (R.T. 336). In Mott's words, ". . . he said that there was a technical item involving 1961 that wouldn't concern me and that he could discuss it with Agent Barr and that I could leave. I told Mr. Rickey I was not going to leave, that I was in charge of this investigation, that if he had anything to bring up, that he could tell it to both of us." (R.T. 336).

Appellant then told the agents that in 1961 he had had a transaction with one Robert Huff that he thought qualified as a nontaxable exchange (R.T. 337).

Appellant explained the transaction, and the agents advised him that it involved a taxable sale of securities. Specifically, appellant should have reported on his 1961 return the gain from the sale of 1,000 shares of General Telephone & Electronics Corp. stock, as reflected in Exhibit 37.

Appellant was not represented by counsel at the May 14 meeting, nor was he advised of his right to counsel. He was represented by counsel at all his subsequent meetings with Special Agent Mott (R.T. 387).

SPECIFICATION OF ERROR RELIED UPON

1. The trial court erred in admitting evidence of statements allegedly made by appellant at a meeting with Special Agent Marc P. Mott and Internal Revenue Agent Berton J. Barr on May 14, 1962.

SUMMARY OF ARGUMENT

1. Prior to the May 14, 1962, meeting, it had been ascertained that appellant had omitted a substantial amount of income from his 1960 return. The internal revenue agent making the audit had reported this fact to a special agent of the Intelligence Division, who had then taken charge of the investigation. Under the direction of the special agent, the revenue agent arranged for appellant to come to the offices of the Intelligence Division on May 14, 1962. At that time a question-and-answer statement was taken from him,

and the special agent undertook to make a secret tape-recording of that entire conference. His purpose was to obtain evidence of wilfullness which would warrant criminal prosecution.

Under the circumstances of the case, the accusatory stage in the proceeding had been reached on May 14, 1962, and under the rule of *Escobedo v. Illinois,* appellant had a constitutional right to counsel at that time. The fact that he had not been taken into custody is immaterial, in view of the differences in the procedures followed in the investigation of tax evasion from those followed in the investigation of other criminal offenses.

2. When appellant was interrogated on May 14, 1962, he was unaware that the purpose of the proceeding was to obtain evidence of guilt. In this case, as in *Massiah v. U. S.,* the Government employed deceit in order to interrogate appellant in the absence of counsel, and evidence of his incriminating statements was used against him at his trial. His effective right to counsel was thus violated.

3. Since, due to the methods followed by the government agents, appellant was unaware of his need for counsel, it cannot be said that he waived his right to counsel by not requesting it.

ARGUMENT

1. WHEN APPELLANT MET WITH SPECIAL AGENT MOTT AND INTERNAL REVENUE AGENT BARR AT THE OFFICES OF THE INTERNAL REVENUE SERVICE ON MAY 14, 1962, THE ACCUSATORY STAGE IN THE PROCEEDINGS AGAINST APPELLANT HAD BEEN REACHED, AND APPELLANT WAS ENTITLED TO THE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION.

When Internal Revenue Agent Berton J. Barr was assigned to examine appellant's 1960 return, it was for the purpose of determining whether any civil tax adjustments should be made (R.T. 174). His examination led to the discovery by appellant that he had failed to include in his 1960 return the gain from the sale of a block of General Telephone & Electronics Corp. stock (R.T. 186).

The omitted transactions involved a total sale price of $101,793.91, resulting in a gain of $72,254.01, of which 50% or $36,127.00, was taxable (Ex. 36).

The day after appellant had disclosed the omission to Barr, they met again at appellant's home (R.T. 186). After some discussion in which appellant explained how the omission had occurred, he told Barr he would like to file an amended return and pay the deficiency (R.T. 284, 524). Barr replied that he would discuss it with his superiors and that he would call appellant as soon as he had done so (R.T. 284).

At this point, the whole complexion of the case changed. Instead of taking the question up with his regular supervisor, Barr reported his findings to Glenn Adrian, head of the fraud group in the Audit Division (R.T. 250, 356-358). Adrian sent him up

to see Special Agent Marc P. Mott, to whom he reported the omission from appellant's return (R.T. 250). Whereas Barr had told appellant that he would determine whether it would be proper for appellant to file an amended return and pay the additional tax owing, there is no evidence that he discussed these questions with anyone. Instead, he reported the case to Adrian, obviously as a possible fraud case.

Mott testified as follows (R.T. 251, line 11 to 252, line 1):

> "Q. Did he [Barr] make any statement to you as to why he was giving you this information?
>
> A. Well, it was understood there was a substantial amount of omitted income in the year 1960 to which Mr. Adrian or Mr. Barr, and myself, raised the possibility that it was wilfully omitted.
>
> Q. So that all three of you understood at that point, whatever your conversation may have been, that this might be a fraud case?
>
> A. Yes.
>
> Q. And by that you all equally understood that it might result in criminal prosecution, isn't that correct?
>
> A. I can't speak for Mr. Barr or Mr. Adraian (sic) For myself, yes.
>
> Q. This was your understanding?
>
> A. Yes."

Mott's purpose in arranging the May 14 meeting, according to his own testimony, was to obtain statements from appellant that might be incriminating (R. T. 253, lines 2-5):

"Q. And this was for the purpose, was it not, if possible, of obtaining statements which might be incriminating?

A. Yes, if possible, yes, yes."

Mott testified that his purpose was also to ascertain if there were explanations that could have cleared up the entire matter and obviated prosecution (R.T. 253, lines 7-11), but he definitely thought it might be a fraud case (R.T. 253, lines 19-23). His actions clearly demonstrated his real feelings about the case:

(a) He instructed Barr to suspend his audit (R.T. 235, line 15).

(b) He told Barr to telephone appellant and ask him to come to the 21st floor at 100 McAllister Street, San Francisco (R.T. 363) (where the Intelligence Division offices were located), but he did not instruct Barr to mention the Intelligence Division or to advise appellant that a special agent wanted to talk to him (R.T. 235).

(c) He made elaborate preparations to record the conference secretly.

When Barr called appellant, he told him that he had discussed with his superiors the question of filing an amended return and paying the additional tax, and that it would be satisfactory to do so (R.T. 524). He said that a Mr. Glenn Adrian would be present, but he did not identify Adrian. Appellant naturally assumed that Adrian was Barr's superior (R.T. 524, 525).

Mott testified under cross-examination that he had three reasons for making the tape-recording (R.T. 370):

(a) He wanted to test the equipment under actual working conditions.

(b) He wanted to obtain an accurate transcription of the conference.

(c) He wanted to protect himself from a possible false charge that he had threatened or abused the taxpayer.

When it was pointed out to him that he could have accomplished all three of these purposes equally well if appellant had known the recording was being made, he attempted to explain his answers as follows (R.T. 372, line 11 to 374, line 19):

> "A. In a criminal case and especially, I mean, as far as Internal Revenue laws, one of the things that we have to find out is whether someone wilfully omitted some income or made other overstatements of expenses or whatever the issue may be, as opposed to making a mistake. And one of the ways of reaching this decision is to test the truthfulness of the person. And if Mr. Rickey had known that the conversation was being recorded, I don't believe that he would ever be able to demonstrate anything different, anything to the contrary.
>
> Q. Your real purpose, then, was to try to catch Mr. Rickey in some statement that could be used against him later on, wasn't it?
>
> Mr. Brosnahan: Object to the form of the question. That isn't what the witness said. He said

he wanted to find out whether or not the witness was truthful.

Mr. Johnston: I think it is proper cross-examination.

Mr. Brosnahan: I think that it is argumentative and not accurate.

The Court: Well, reframe it and we will see.

Q. Mr. Mott, wasn't your real purpose in using this equipment and using it secretly—was not really to test the equipment and not really just to get an accurate record of what was said and not really just to protect yourself against some improper charge later, but to try to entice and catch Mr. Rickey in making some statement that could be used against him later on?

A. No, sir; I believe it's a combination of the factors that I have just told you which I think were primarily four.

Q. Well, you mentioned only three, I think, originally.

A. Well, I expanded on that, the testing of the truthfulness of the——

Q. I see.

A. I anticipated I may talk to him at a later time and that he might discuss the same thing and see if we have—if the answers are consistent with his first statement."

Thus, prior to the May 14 meeting, Mott not only anticipated future interrogations of appellant; he was preparing the proof of the prosecution's case. His purpose at that meeting was to catch appellant in inconsistent statements, and according to his testimony at the trial he succeeded in that purpose.

The only reasonable conclusion to be drawn from the foregoing facts is that the accusatory stage of the proceeding had been reached at the time of the May 14 meeting. The proceeding had changed from a routine audit by Revenue Agent Barr to a joint investigation directed by Special Agent Mott. It was already known that appellant had omitted a large amount of taxable income from his 1960 return; all that remained was to develop evidence of wilfullness. This was Mott's express purpose at the May 14 meeting.

Under the rule of *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758 (1964), when a criminal investigation enters the accusatory state, the accused has a constitutional right to counsel under the Sixth Amendment to the Constitution. In that case the defendant, who was later convicted of murder, had been taken into custody and interrogated at length by the police. Although he repeatedly asked to speak to his lawyer, and his lawyer was at police headquarters attempting to see his client, the defendant and his lawyer were not permitted to consult. Nor was the defendant advised of his absolute constitutional right to remain silent. The defendant's motions to supress incriminating statements made under this interrogation were denied. The Supreme Court reversed the judgment of conviction.

The Supreme Court's decision in *Escobedo* was of course based upon the facts of that case, and those facts differed from the facts in this case. But the

principle of that decision should apply equally in the circumstances of this case.

The factual differences in the two cases stem from differences in the procedures followed in tax evasion investigations from those followed in the investigation of other felonies, such as murder. In a tax investigation, the defendant is never taken into custody prior to the completion of the investigation and the return of an indictment. His identity is known from the beginning, however, and the entire point of the investigation is to determine whether he has committed the crime of wilfully attempting to evade and defeat his taxes. In the case of almost any other felony, on the other hand, the fact that an offense has been committed is generally known at the outset, and the purpose of the investigation is to identify the guilty party.

If the right to counsel were limited to defendants in actual custody, it would have virtually no application to persons suspected of income tax evasion, since the taxpayer under suspicion is almost never in custody at the time he is interrogated. But it is when he is under interrogation that he has his greatest need of counsel, and this need is no less merely because he is not in custody.

Whether or not the defendant is in custody should be considered significant only as evidence of whether the accusatory stage has been reached. When a murder is known to have been committed, the person who is believed to have committed the offense is ordinarily

taken into custody and at that point, under *Escobedo,* the proceeding has reached the accusatory stage. The Court said:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. at 492, 84 S. Ct. at 1766.

In a tax investigation, the person suspected of having committed a criminal offense is known from the beginning, and the purpose of the Treasury agents is to determine whether an offense has in fact been committed. Thus, in the present case, it had been ascertained that appellant had omitted a substantial amount of income from his return; the question remaining was whether this had been done wilfully. If so, an offense had been committed, and there was no question from the start about who had committed it. The proceeding entered the accusatory state when Mott took command of the investigation, instructed Barr to have appellant come to the offices of the Intelligence Division, and arranged to record the conversation.

In *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199 (1964) the Supreme Court reversed a conviction for narcotics offenses because federal agents had by pre-arrangement surreptitiously listened to incriminating statements made by the defendant after he had been charged, had entered a plea of not guilty, and had been released on bail. The use of this evidence

at the trial was held to violate the defendant's constitutional right to counsel. *Escobedo* represents an extension of this holding to an interrogation conducted prior to indictment, on the ground that the accusatory stage had been reached.

This Court has held in a recent opinion that the rule of *Escobedo* as to the defendant's right to counsel applied ". . . if the investigation was then no longer a general inquiry but had focused on appellant . . ., interrogation was conducted leading to incriminatory statements, appellant had requested and been denied counsel and appellant had not been effectively warned of his absolute constitutional right to remain silent." *Wright v. Dickson,* 336 F. 2d 878, 882 (9th Cir. 1964).

Appellant went to the May 14 meeting in the belief that he was to meet with Revenue Agent Barr and his superior for the purpose of filing an amended return and paying a tax deficiency. He took with him the amended return and a check to pay the deficiency (R.T. 296). Although Mott was introduced as a special agent of the Intelligence Division, this had no meaning to appellant, who assumed that Mott was simply present as Barr's superior. The warning of his constitutional privilege against self-incrimination failed to alert appellant to the fact that this was a criminal investigation (R.T. 291). He was not told of his right to counsel nor of his right to remain silent (R.T. 234, 535-536).

If appellant's constitutional right to counsel was to be of any real value to him, it was at precisely that stage of the proceeding. He was totally unaware

of his jeopardy; but competent counsel would have recognized that jeopardy at once and would have advised appellant accordingly. Experienced counsel would have realized that Special Agent Mott was not concerned with the payment of a civil deficiency, but with possible criminal prosecution; he would have appreciated the significance of Mott's warning about possible self-incrimination.

Congress, as well as the Courts, has recognized that at such a confrontation, fairness requires that a taxpayer be entitled to the advice of counsel. The Administrative Procedure Act, 5 U.S.C., Section 1005(a), provides that any person subpoenaed by a special agent and every party in any agency proceeding has the right to representation by counsel. See, e.g., *U.S. v. Smith,* 87 F. Supp. 293 (D. Conn. 1949). In describing the value of an attorney's assistance in a tax fraud investigation, this Court has commented in a slightly different context:

> "Few areas of the law draw so many individuals in contact with governmental powers as does federal taxation. Yet this branch is one of the thickest of the law's 'bramblebush'. The ramifications of tax law are often a stubborn challenge to the most expert legal practitioner. The very nature of the tax laws requires taxpayers to rely upon attorneys . . ." *U.S. v. Judson,* 322 F.2d 460, 468 (9th Cir. 1963).

In this case, a critical confrontation between appellant and the Government occurred at the interrogation on May 14, 1962. The investigation changed to an ac-

cusatory stage at that time, and it was at that time that appellant's constitutional right to counsel matured. To hold otherwise would be drastically to restrict the constitutional right in tax cases as contrasted with cases involving other kinds of criminal offenses.

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2. APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL WAS VIOLATED BY THE TREASURY AGENTS AT THE MAY 14 MEETING.

As we have shown, at the May 14 confrontation, Special Agent Mott employed deceit in order to interrogate appellant for the purpose of eliciting incriminating statements from him before appellant realized that a criminal investigation was proceeding against him in which he would need the advice of counsel. The situation, thus, is similar to that in *Massiah v. U.S.*, 377 U.S. 201, 84 S. Ct. 1199 (1964), and *Queen v. U.S.*, 335 F.2d 297 (D.C.Cir. 1964).

In *Massiah* the defendant, who had been indicted and had retained an attorney, held a conversation, in the absence of his counsel, with one of his co-defendants while sitting in the latter's automobile. The defendant was unaware that the co-defendant, cooperating with Government agents, had allowed the installation of a radio transmitter under the front seat of the car, by means of which a federal agent was listening to the conversation. At defendant's trial, the federal agent, over defendant's objection, testified to incriminating statements made by the defendant during this conversation. The Supreme Court reversed the conviction on the ground that the defendant had been de-

nied the basic protection of the Sixth Amendment right to counsel, "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206, 84 S.Ct. 1203.

In the case at bar, as in *Massiah,* the government employed a series of deceits in order to interrogate appellant, who was unaware that the purpose of the interrogation was to obtain evidence of guilt. In the case at bar, as in *Massiah,* there was used against appellant at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him in the absence of counsel.

In *Queen v. U.S.,* supra, the police questioned the accused informally in a courthouse waiting room after she had been arrested, brought before the United States Commissioner, and secured a continuance in order to obtain an attorney. The Court reversed her conviction, based in part upon her damaging admissions which the police obtained during that questioning:

> "The result of this intervention by the officers was to frustrate the right of the accused to have the assistance of counsel until by reason of these extrajudicial proceedings such assistance would be rendered fruitless if the statements thus obtained could be used to convict. For this reason, and notwithstanding the absence of an indictment, the case clearly comes within the reasoning which led to the exclusion of the evidence in *Massiah* and *Escobedo.*" 335 F.2d, at 298.

See also *Greenwell v. U.S.*, 336 F.2d 962, 966 (D.C.Cir. 1964), holding that statements obtained from the police while they delayed bringing the defendant before a magistrate were inadmissible under the *Mallory* and *McNabb* rules, and noting that under the *Massiah* and *Escobedo* cases, "Interviews by government agents with accused persons in the absence of counsel may be employed to develop investigative leads as to others, but not to produce evidence for the trial of the accused."

Where, as in the case at bar, federal agents deliberately deceive an accused into making incriminating statements before he realizes that he is under intensive criminal investigation and while he is without the assistance of counsel, under the principles of the *Massiah* and *Queen* cases his incriminating words cannot be used against him at his trial.

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3. APPELLANT CANNOT BE SAID TO HAVE WAIVED HIS RIGHT TO COUNSEL, NOR CAN HIS RIGHT TO COUNSEL, UNDER SUCH CIRCUMSTANCES, BE SAID TO BE CONDITIONED UPON A REQUEST.

Appellant's right to counsel in the case at bar cannot be said to be conditioned upon a request to consult with an attorney. Appellant did not have counsel with him at the May 14 interrogation because he did not realize that he had a need for counsel (R.T. 287-289, 525); he was not aware that he was under criminal investigation (R.T. 291). We have traced the methods to which the government resorted to keep appellant in that state of ignorance. The Court in

Massiah did not condition the defendant's right to counsel upon a request, because in *Massiah,* as in the case at bar, the Government had tricked the accused into making incriminating statements while he was unaware that he was being interrogated in order to accumulate evidence of guilt for his criminal prosecution.

Furthermore, this Court has noted that ". . . it makes no difference whether appellant asked to consult with retained counsel or to be provided with the assistance of appointed counsel, nor, indeed, whether he requested counsel at all, except as the latter fact may bear upon waiver." *Wright v. Dickson,* supra, 336 F.2d at 882.

Appellant cannot be held to have waived his right to counsel because, due to the methods followed by the Government, appellant was unaware of his need for counsel. In *Carnley v. Cochran,* 369 U.S. 506, 513, 82 S.Ct. 884 (1962), the Court said:

> ". . . It is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." Accord, *People v. Dorado,* 62 A.C. 350 (1965).

The waiver of a constitutional right is defined as an intentional relinquishment or abandonment of a known right or privilege, which cannot be effected unless it is intelligently and competently given. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019 (1937); *Griffith v. Rhay,* 282 F.2d 711, 717 (9th Cir. 1960). Not only did Special Agent Mott fail to inform appellant of his unconditional right to remain silent

or his right to counsel, but the uncontradicted evidence clearly shows that Special Agent Mott arranged the meeting in order to interrogate appellant at a time when appellant was not aware that he was being investigated for a possible criminal violation. In such circumstances, it cannot be said that appellant "waived" his right to counsel.

CONCLUSION

Appellant respectfully submits that the judgment of conviction on the second count of the indictment should be reversed and a new trial granted.

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September 20, 1965

Respectfully submitted,
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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